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HONORABLE JOHN C. COUGHENOUR

12 UNITED STATES DISTRICT COURT
13 WESTERN DISTRICT OF WASHINGTON
14 AT SEATTLE

15 **OMNI INNOVATIONS, LLC, a
Washington Limited Liability
company; and JAMES S. GORDON,
JR., a married individual,**

16 Plaintiffs,

17 v.

18 **STAMPS.COM, INC. a Delaware and
California corporation; and
JOHN DOES, I-X,**

19 Defendants,

20 1. I, James S. Gordon, Jr., am the Plaintiff in the above captioned lawsuit. I am
21 over the age of 18, of sound mind, and am otherwise competent to testify.

22
23 NO. C07-386-JCC

24 **DECLARATION OF JAMES S.
GORDON, JR. IN SUPPORT OF
PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION TO
DISMISS FOR FAILURE TO
STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED
PURSUANT TO FED. R. CIV. P.
12(b)(6)**

25 DECLARATION OF JAMES S. GORDON, JR. IN
SUPPORT OF PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION TO DISMISS - 1

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2. I am owner of the domain name “gordonworks.com”, which I registered on or about May 1998.
3. I am the owner of Omni Innovations, LLC, a Washington limited liability company.
4. I have been plagued by spam for well over eight years. Over time, my spam problem has grown more severe, and has now spiraled out of control, consuming more and more of my time and resources. From late 1998 to late 2003, I fought spam by deleting, complaining, reporting, and filtering it. And those activities continue to the present day. My first lawsuit against a spammer was filed a full five years (five uncompensated years wherein I received millions of spam) after the inception of this persistent spam problem, i.e. December 2003. And to this point all my efforts to curtail the onslaught of spam have failed. I have been substantially adversely impacted by the continued onslaught of spam primarily due to the time commitment and costs of hardware and software needed to manage this problem. That adverse effect is exacerbated by the fact that spammers do not stop/have not stopped sending me spam during litigation and now subsequent to litigation.
5. Defendant, Stamps.com, has used rotating, co-op ads to “deflect” the complaints and to develop the defense that “we did not send the email”. Many of the spam that they sent or caused to be sent on their behalf were

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1 incorporated into online newsletters with many other advertisers.

2 6. Because spammers appear to be coalescing in their defense efforts, it appears
3 necessary to clarify several matters that appear to have been misunderstood
4 by the Court, and which are being used by spammers in their dubious
5 defenses.

6 7. First, contrary to the way my deposition testimony in the Virtumundo case
7 has been mischaracterized, I have yet to do any dissertation research. The
8 topic that I have chosen for this future dissertation does not require me to
9 collect a single email. Thus there is no benefit in receiving spam for a
10 dissertation project. Any statement to the contrary reflects hypothetical
11 conjecture as to possible benefits to the receipt of spam – not actual or
12 anticipated benefits.

13 8. Second, I do not have a “spam business”. I do, however, have a spam problem
14 which interferes with my legitimate business and academic interests and
15 activities. My business training and experience dictate that I treat the de-
16 listing from spam as a business activity to more effectively deal with the
17 spam problem.

18 9. Third, I have yet to see a single document which substantiates that I have
19 opted in to or requested to receive a single defendant’s spam. On the other
20 hand, defendants have fabricated the existence of some unknown, and
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1 unnamed entity(ies) which has (have) somehow conferred to it the right to
2 send me commercial email. This assertion has no basis in fact. And until
3 such shadowy, anonymous “marketing partners” or “affiliates” step forward,
4 the assertion should be treated as unsubstantiated hearsay, or perhaps more
5 accurately as nonsense. No defendant has (nor can it produce) my permission
6 to send email to me, thus the notion that I somehow solicit spam has no
7 basis, in fact. Without this cornerstone, the thesis of setting up a litigation
8 factory is meritless as there is no fuel to sustain it – no permission, no opt-
9 ins, countless thousands of requests to stop, complaints, de-listing requests,
10 etc.

12 10. I have filed over 14,000 regulatory complaints against spammers. Add to
13 that, I have caused to be sent close to a million automated cease and desist
14 emails directly to the sender of each email sent to me. Further, I have
15 diligently used the SpamCrimeReporter application to automatically de-list
16 myself from tens of thousands of spam received during 2004-2006. Lastly, I
17 have sent dozens of certified letters to spammers to get them to stop – all to
18 no avail.

20 11. There is an over-abundance of detailed documentation of my efforts to halt
21 the onslaught of spam. Yet, there is not a single document to demonstrate my
22 request to receive spam from any defendant which I have sued. It is not
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1 possible to, on the one hand, "promote" or engage in a spam business. And, on
2 the other hand, subvert that very same business by deleting emails, sending
3 thousands of complaints to companies and regulators, sending thousands of
4 reports of abuse to spammers' service providers, and filtering all incoming
5 spam with server-side and client anti-spam applications.

- 6
- 7 12. The suggestion that I do not filter email arises from what appears to be
8 another mischaracterization of my prior testimony, and is false. The fact that
9 these filters are not effective can be shown by all the spam that is caught in
10 these filters as spammers learn new ways to circumvent or deceive the filters.
11 The defendant, Adknowledge was caught in my filters hundreds of times, but
12 each time it would find a way to deceive the filters the next time. Without the
13 ongoing deception, my filters would likely have been able to stop most spam.
14 The reason that Virtumundo and Adknowledge are still being discussed is
15 that these companies provide/provided spamming services for at least eight of
16 the other defendants. Adknowledge has begun to use/allow the outright
17 forging of email headers by its affiliates. And Virtumundo continues to rack
18 up 700,000 complaints per month or 8 million complaints a year according to
19 its own internal reports.

- 20
- 21 13. De-listing or what spammers call unsubscribing, which I have done countless
22 times takes between 30-45 seconds per email. This is due to the fact that one

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1 must 1) open the email 2) find the appropriate link 3) double-click the link
2 and wait for the web page to appear (assuming the web page is still active) 4)
3 type in the email address that you wish to have de-listed (if you have
4 multiple email addresses – each must be entered). Some web pages
5 automatically populate one's email address – the exception in my experience.
6 As I receive many thousands of spam per day – devoting 30 seconds per email
7 is an untenable proposition.

- 9 14. The so-called spam business that everyone seems to envision but me has
10 yielded some settlement agreements and payments to me (and my
11 customers). But these payments do not in any way compensate for the time (9
12 years) and aggravation of dealing with miscreants who have nothing better to
13 do but peddle goods and services to an unwilling public. These payments do
14 not compensate for having my entire family and two friends sued by
15 spammers simply because they were on my witness list. These payments do
16 not compensate for the loss of use of my domain to spammers who trespass
17 and steal my identity (via joe jobbing or appropriating my intellectual
18 property). And these payments do not compensate for the impugning of my
19 reputation by spammers.

- 21 15. In addition to the costs outlined elsewhere, I now “owe” a spammer \$112,000
22 plus interest. This outcome exacerbates the situation as spamming is first
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1 and foremost cost-shifting from the sender to the receiver. I have now
2 received the ultimate "postage due" from spammers. The court appears to be
3 telling me that I have no recourse to trespass, identity theft, and the
4 financial burdens and impacts due to receiving spam as an IAS.

5 16. Defendants are attempting to use the ruling in Gordon v. Virtumundo as a
6 "get out of jail free card", which allows them to now break the law in even
7 more ways than before. That is especially true of Virtumundo and
8 Adknowledge, which have sent hundreds of emails to me since the
9 Virtumundo order by this court. Spammers appear to be coalescing under the
10 Virtumundo umbrella, which they seek to use as their safe harbor from
11 lawsuits.

12 17. Courts are uniformly unaware that the sending of spam to me by all past and
13 current defendants is "contractually barred". In other words, the backbone
14 network service providers (all) outlaw spam. It is only through
15 subterfuge/deceit that a spammer can ply their trade. And it is only through
16 this network or infrastructure that spam can be sent. This fact is tantamount
17 to the ultimate deception. Legislatures, courts, businesses, and the public
18 have bought spammers "bill of goods", but there is no substance to their claim
19 of legitimacy. One only has to review the acceptable use policies of all major
20 network service providers and the contracts of spammers for internet services
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1 to begin to get a sense of the depth of deception, which this industry
2 perpetrate.

3 18. Our expert witness in Virtumundo, Mr. Resnick, is a member of the Internet Engineering
4 Task Force (IETF), an international community of practice “serving” as
5 guardians/custodians for the Internet. Also with IETF is Steve Atkins who published a
6 document on the “Size and Cost of the Problem”, i.e. spam problem. In this PowerPoint
7 presentation he states that each spam results in a \$1-2 loss in productivity. If Omni takes
8 only ten percent of this figure as a baseline, each day would result in a loss of \$400-500
9 due to spam. If one considers only 5%, the numbers would result in a \$200-250 daily
10 loss. And at only 1%, the daily loss is \$40-50 or \$14,600 to \$18,250/yr. This loss takes
11 place seven days per week as spam takes no holidays – forcing small Internet Access
12 Services to work 7 days per week at spam abatement. After close to nine years of this
13 “adverse effect”, I still see no relief in sight. The one percent figure above or \$14-18k/yr.
14 represents a larger portion of Omni’s gross income, which is less than \$100,000 per year,
15 than the percentages represented in this and other studies of spam costs. As a result, it can
16 be said that the adverse effect on my Internet Access Service is much more significant
17 than with most businesses providing mail and web services to the public.
18

19
20 I declare under penalty of perjury under the laws of the United States that the foregoing is
21 true and correct.
22

23 EXECUTED this 13th day of August, 2007
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Certificate of Service

I, hereby, certify that on August 13, 2007, I filed the subjoined pleading with this Court via approved electronic filing, and served the following:

Attorneys for Defendants: Newman & Newman, Derek Newman, Randall Moeller.

/s/ Robert J. Siegel

Robert J. Siegel

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